

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRANCE ANTHONY FURLINE,

Defendant-Appellee.

Supreme Court
No.

Court of Appeals
No. 335906

Lower Court
No. 16-42043-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALVIN BERNARD JENKINS, SR,

Defendant-Appellee.

Supreme Court
No.

Court of Appeals
No. 336203

Lower Court
No. 16-42044-FH

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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EXHIBITS

- 1) *People of the State of Michigan v Terrance Anthony Furline*, unpublished opinion per curiam of the Court of Appeals, decided July 3, 2018 (Docket No. 335906), consolidated with *People of the State of Michigan v Alvin Bernard Jenkins, Sr.*, unpublished opinion per curiam of the Court of Appeals, decided July 3, 2018 (Docket No. 336203)
- 2) Defendant Furline's Motion for Separate Trials, dated April 14, 2016
- 3) Hearing Transcript, dated May 5, 2016
- 4) Amended Affidavit in support of Motion for Separate Trials, dated May 5, 2016
- 5) Three recorded interviews with Alvin Jenkins, one which was not dated, and two from November 6, 2015 and December 4, 2015, respectively.
- 6) Opinion and Order dated June 2, 2016, denying Defendant-Appellees' Motion for Separate Trials

STATEMENT OF APPELLATE JURISDICTION

The People seek leave to appeal the Michigan Court of Appeals' unpublished opinion, issued on July 3, 2018, which vacated Defendant-Appellees' convictions and sentences and remanded both cases for a new trial.¹ This application for leave to appeal is being timely filed within 56 days of that opinion. Therefore, this Court has jurisdiction over the instant application for leave pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2)(a).

¹ *People of the State of Michigan v Terrance Anthony Furline*, unpublished opinion per curiam of the Court of Appeals, decided July 3, 2018 (Docket No. 335906) and *People of the State of Michigan v Alvin Bernard Jenkins, Sr.*, unpublished opinion per curiam of the Court of Appeals, decided July 3, 2018 (Docket No. 336203) See attached People's Exhibit 1.

STATEMENT OF QUESTION INVOLVED

- I. DID THE COURT OF APPEALS CLEARLY ERROR, CAUSING MATERIAL INJUSTICE, WHEN IT VACATED DEFENDANT-APPELLEES' CONVICTIONS AND SENTENCES AND REMANDED FOR A NEW TRIAL BASED ON ITS DETERMINATION THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLEE FURLINE'S MOTION FOR SEPARATE TRIALS?

Plaintiff-Appellant says "YES".

Defendant-Appellee says "NO".

STATEMENT OF FACTS

The charges in this case arise out of an incident that occurred on or about October 29, 2015, at the Home Depot located in Kochville Township, Saginaw, Michigan. The prosecution's theory of the case was that two men, Defendant-Appellees, on the day in question and on at least one other occasion, entered Home Depot stores, gathered several high-priced items onto a cart, set fire to an area in the store, and during all the commotion, they would simply take the items from the store without paying for them. After they left the store, they would take the stolen merchandise to another home improvement store, do a no-receipt return, obtain a refund for the items in the form of a gift card, and they would then sell the gift card to the owner of a party store for cash.

On October 29, 2015, in the early morning hours, a corporate email was sent to the management team, informing them of a fire and subsequent theft that had taken place on the previous day at the Home Depot located in Flint, Michigan.² Later on that morning, around 8:15 a.m., a meeting was held, and the employees who attended were informed about the incident.³ Michael Stowe, who was the assistant manager on duty that morning, testified that he took his lunch break around 11:15 a.m.⁴ While he was outside sitting in his car, he heard fire alarms going off between 11:30 and 11:45 a.m. in the outside garden center.⁵ Due to the incident in Flint on the previous day, the Saginaw store was scheduled to test the fire alarms that day; however, despite this knowledge, Stowe exited his vehicle and went to the front door.⁶ When he arrived at the front of the store, he observed smoke coming from the north end of the store, and

² Tr 9/14/2016, p 32

³ Tr 9/14/2016, p 33

⁴ Tr 9/14/2016, p 34-35

⁵ Tr 9/14/2016, p 34-35

⁶ Tr 9/14/2016, p 33, 35

people were beginning to evacuate.⁷ Stowe testified that he did not see anyone set the fire, nor was he aware of the source of the fire at the time he first observed the smoke.⁸

Mason Martinez, a garden sales associate, also worked the morning shift on October 29, 2015.⁹ On that particular day, Martinez recalled assisting a customer, later identified as Defendant-Appellee, with the selection and possible purchase of a power washer.¹⁰ Specifically, Martinez recalled that Furline had approached him to ask for help in selecting a “good power washer.”¹¹ Martinez also recalled that, at the time Furline approached him, he was accompanied by another male who was on the phone and who eventually “kinda left the situation ... left talking.”¹² While they were discussing options for power washers, Martinez offered some lower priced options, which Furline declined because he was interested in the more expensive DeWalt brand power washer.¹³ After Martinez loaded the power washer onto Furline’s cart, Martinez went to lunch and did not see either Defendant for the remainder of the day.¹⁴

Jacob Tyson, an employee in the millwork department at the Saginaw Home Depot, also worked the morning shift on October 29, 2015.¹⁵ Along with most other employees who worked that morning, Tyson also attended the morning meeting where management alerted everyone about the Flint Home Depot incident.¹⁶ Later on that morning, Tyson noticed a customer standing in aisle 13 (the insulation aisle), and when Tyson asked if he needed help, the customer said “no, just looking at stuff.”¹⁷ Tyson returned to his desk to do a quote at that point, and shortly thereafter, the same customer approached him and said “hey man, there is a fire in [aisle]

⁷ Tr 9/14/2016, p 35-36

⁸ Tr 9/14/2016, p 36

⁹ Tr 9/14/2016, p 41

¹⁰ Tr 9/14/2016, p 42, 45

¹¹ Tr 9/14/2016, p 46

¹² Tr 9/14/2016, p 45

¹³ Tr 9/14/2016, p 46; the power washer was valued at approximately \$800.00 Tr 9/14/2016, p 53

¹⁴ Tr 9/14/2016, p 47

¹⁵ Tr 9/14/2016, p 54-56

¹⁶ Tr 9/14/2016, p 56-57

¹⁷ Tr 9/14/2016, p 57

13.”¹⁸ When asked at trial if he could identify the person who told him about the fire, Tyson indicated that it was Furline.¹⁹ Tyson testified that, before he was alerted of the fire, he saw Furline walking with Jenkins, but he (Jenkins) “just disappeared out of the picture.”²⁰ Tyson also recalled being down in the garden area talking to another employee, when he saw Jenkins and Furline with a big flat push cart that had a “power washer on it and some other stuff.”²¹ Lastly, Tyson indicated that, on the date of the fire, Furline was wearing red sweatshirt with black pants and a black “beanie” cap.²²

Maria (Theunick) Bebeau testified that she was employed at the Saginaw Home Depot at the contractor’s sales desk, and she worked the morning shift on October 29, 2015.²³ Bebeau was also present for the morning meeting where employees were advised that there had been an arson at the Flint Home Depot the day before.²⁴ When asked if management had given a description of the Flint suspects during the meeting, Bebeau indicated that no description was given.²⁵ After the meeting, Bebeau returned to her station, where she indicated she often uses her peripheral vision to glance over to see customers entering the store.²⁶ Even though the store was busy that day, Bebeau testified that she noticed a couple of gentleman entering the store that stuck out to her based on their considerable difference in height.²⁷

Bebeau also noted that the gentlemen appeared suspicious because they were just “quietly walking – kind of whispering”, which was “not like a normal contractor or DIY’ers walking in

¹⁸ Tr 9/14/2016, p 59

¹⁹ Tr 9/14/2016, p 57

²⁰ Tr 9/14/2016, p 58

²¹ Tr 9/14/2016, p 58

²² Tr 9/14/2016, p 61

²³ Tr 9/14/2016, p 73

²⁴ Tr 9/14/2016, p 75

²⁵ Tr 9/14/2016, p 82

²⁶ Tr 9/14/2016, p 81

²⁷ Tr 9/14/2016, p 82

the door saying hey, where is this; or hey; or hi how are you doing type thing.”²⁸ She further indicated that, after entering the store, the two men continued down the lumber aisle.”²⁹ When asked if she could identify the two suspicious men she saw enter the store on October 29, 2015, Bebeau identified both Jenkins and Furline.³⁰ Like Tyson, Bebeau also indicated that she recalled that Furline wore a red hoodie.³¹ Bebeau became aware of the fire in the store when one of her co-workers yelled “fire” loudly and told her to call 911, which she did.³² Bebeau also took pictures of the fire once everyone had exited the building.³³

Kathy Marciak, another Saginaw Home Depot employee, was also working on October 29, 2015 as a pro-end cashier.³⁴ Marciak explained that, as a pro-end cashier, her job was to greet customers when they come in, and to check receipts on their way out to ensure they paid for their merchandise.³⁵ On this particular day, Marciak was also instructed to inform customers that the store was testing the sprinkler system and not to be alarmed if they heard the sprinkler system go off.³⁶ Marciak did not attend the morning meeting that day because she could not leave her post; however, a co-worker told her what was said during the meeting regarding the Flint incident.³⁷ At one point prior to the fire, a male Marciak later identified as Jenkins, sat down on a stool near the front of the store with a cart full of large ticket items, and she began to give him information about obtaining a store credit card.³⁸

Jenkins told Marciak he could never get a credit card, but his friend who was shopping

²⁸ Tr 9/14/2016, p 81

²⁹ Tr 9/14/2016, p 81

³⁰ Tr 9/14/2016, p 81

³¹ Tr 9/14/2016, p 82

³² Tr 9/14/2016, p 77

³³ Tr 9/14/2016, p 79

³⁴ Tr 9/14/2016, p 90

³⁵ Tr 9/14/2016, p 90

³⁶ Tr 9/14/2016, p 92

³⁷ Tr 9/14/2016, p 93-94

³⁸ Tr 9/14/2016, p 94-95

would be up shortly to pay for the items, and he was just waiting for his friend.³⁹ Marciak indicated that Jenkins appeared to be “jittery” as they were talking.⁴⁰ A short time after this exchange, Marciak heard another co-worker say she smelled smoke, and when the co-worker walked towards aisle 13, she screamed “fire!”⁴¹ At that point, Marciak put her hands on the handles of Jenkins’ cart, they exchanged glances, she went one way with the cart, and Jenkins hopped off the stool and went out the door.⁴² Marciak testified she did not see Jenkins or Furline again that day.⁴³ However, she did recall that Jenkins was dressed in all black, and Furline was wearing a red hooded sweatshirt and black pants⁴⁴.

Austin Parish, another Saginaw Home Depot employee, also worked the morning shift on October 29, 2015 as a sales associate in the garden department.⁴⁵ Parish testified that he also attended the morning meeting in which the employees were apprised of the incident that took place at the Flint store.⁴⁶ Parish also testified that, while he was down in the back main aisle of the store, he saw smoke and began to exit the building.⁴⁷ As he exited the building, Parish noted that a 96-97 maroon Chevy Blazer drove by him at a high rate of speed, which caught his attention as he was standing out in front of the store.⁴⁸ While Parish could not pinpoint the exact speed the vehicle was going, he noted that it was “faster than average.”⁴⁹ Parish could not remember the license plate number while testifying at trial; however, he recalled that it was a sunrise license plate with a couple of “A’s” in the number.⁵⁰ When he was shown a photograph

³⁹ Tr 9/14/2016, p 95

⁴⁰ Tr 9/14/2016, p 99

⁴¹ Tr 9/14/2016, p 98

⁴² Tr 9/14/2016, p 98

⁴³ Tr 9/14/2016, p 101

⁴⁴ Tr 9/14/2016, p 101

⁴⁵ Tr 9/14/2016, p 118

⁴⁶ Tr 9/14/2016, p 119

⁴⁷ Tr 9/14/2016, p 120

⁴⁸ Tr 9/14/2016, p 121

⁴⁹ Tr 9/14/2016, p 123

⁵⁰ Tr 9/14/2016, p 122

of the vehicle that was eventually linked to Defendants, Parish identified the vehicle and license plate as being consistent with the vehicle that sped by him on October 29, 2015.⁵¹ Parish also recalled seeing two gentlemen in the front seat; the passenger was African American and wearing a red sweatshirt.⁵²

Justin Luczak, the Loss Prevention Manager at Lowe's in Flint, testified that he became aware of the Flint and Saginaw Home Depot incidents through "M Live."⁵³ When he became aware of the incident in Saginaw on October 29, 2015 around 1:00 p.m., Luczak called the Loss Prevention Manager at the Lowe's located in Burton, Joy Royal, to give her a heads up on what happened.⁵⁴ Luczak continued to follow M Live for updates throughout the day, and eventually, he heard a description of the suspect vehicle involved in the Saginaw incident – a maroon colored Chevy Blazer.⁵⁵

Joy Royal, the Loss Prevention Manager at the Burton Lowe's store, confirmed that Luczak had called her on October 29, 2015 to inform her of an incident that had taken place at the Saginaw Home Depot.⁵⁶ When Luczak informed her about the fire at the Saginaw Home Depot, he also told Royal to be on the lookout for a large black male in a red hoodie and another black male dressed in all black.⁵⁷ Royal also noted that the two suspects described fit the description of two suspects involved in another active investigation involving a suspicious no-receipt return on the same date as the Saginaw store fire.⁵⁸ The investigation began that day when Royal received a call from a cashier claiming something "just felt funny" about a no-

⁵¹ Tr 9/14/2016, p 122

⁵² Tr 9/14/2016, p 123

⁵³ Tr 9/14/2016, p 128-129

⁵⁴ Tr 9/14/2016, p 129

⁵⁵ Tr 9/14/2016, p 130

⁵⁶ Tr 9/14/2016, p 135-136

⁵⁷ Tr 9/14/2016, p 136

⁵⁸ Tr 9/14/2016, p 136, 138

receipt return he completed.⁵⁹ Specifically, the person returned two faucets without a receipt; however, he walked directly to the customer service desk from the selling floor to return the items.⁶⁰

When Royal reviewed the surveillance footage from that day, she found that, at approximately 1:18 p.m., a maroon Chevy Blazer pulled up, and a male subject dressed in all black (Jenkins) exited the vehicle.⁶¹ The subject entered the store through the main entrance and went back to the plumbing department.⁶² When he emerged from plumbing, the subject was carrying two faucets, and he proceeded to walk around to the lumber end of the store, which was where the Blazer was parked.⁶³ He met up with another subject (Furline) who exited the Blazer and came through the lumber doors.⁶⁴ Furline and Jenkins appeared to have a brief conversation, and Jenkins exited the store while Furline took the two faucets up to the Customer Service desk to ask for a no-receipt return.⁶⁵

Furline was identified as the person who went up to the Customer Service desk because he had to provide his drivers' license in order to process the return.⁶⁶ Once the return had been completed, Defendant-Appellee walked back to the lumber end of the store, exited through those doors, and got back into the maroon Blazer.⁶⁷ The Blazer then did a u-turn, drove back towards the front of the store, stopped, Jenkins exited the vehicle for a few minutes, got back into the vehicle and then drove off.⁶⁸ Royal was also familiar with Jenkins because, back on June 8, 2015, Jenkins conducted a no-receipt return at the Burton Lowe's store, and he was also required

⁵⁹ Tr 9/14/2016, p 138

⁶⁰ Tr 9/14/2016, p 138

⁶¹ Tr 9/14/2016, p 138-139

⁶² Tr 9/14/2016, p 139

⁶³ Tr 9/14/2016, p 139

⁶⁴ Tr 9/14/2016, p 139

⁶⁵ Tr 9/14/2016, p 139-140

⁶⁶ Tr 9/14/2016, p 140

⁶⁷ Tr 9/14/2016, p 140

⁶⁸ Tr 9/14/2016, p 140

to provide identification prior to processing his return.⁶⁹ Once the investigation was concluded, Royal filed a complaint with the Burton Police Department.⁷⁰

Michael Comstock, the Captain of the Kochville Fire Department ("KFD"), was called to the Saginaw Home Depot on October 29, 2015 after someone had called to report a structure fire.⁷¹ When Captain Comstock arrived on scene, the fire was in the process of being suppressed.⁷² When he was finally able to enter the store to survey the damage, Captain Comstock noted that there was "a lot of burned product" and approximately one inch of water on the floor.⁷³

Brandon Rossi, another KFD member, testified that he responded to the fire at the Home Depot around 12:30 p.m.⁷⁴ Rossi's role in the investigation was to assist the Michigan State Police ("MSP") with the cause and origin inspection because he was also a fire inspector.⁷⁵ While the inspection included a search for accelerant, the investigators were unable to find any evidence that an accelerant had been used.⁷⁶ Rossi did note, however, that there was a large volume of smoke in the building, and he needed thermal imaging glasses to be able to see any active flames because the amount of smoke resulted in "zero visibility".⁷⁷ Eventually, Rossi was able to determine that the origin of the fire was aisle 13, and the cause of the fire was an ignition source being exposed to the insulation.⁷⁸ In other words, "someone could have very much taken a lighter to it because the insulation was very flammable."⁷⁹

Lenny Jaskulka, the Fire Investigator for MSP, was unavailable to testify at trial due to

⁶⁹ Tr 9/14/2016, p 141

⁷⁰ Tr 9/14/2016, p 140

⁷¹ Tr 9/14/2016, p 145-146

⁷² Tr 9/14/2016, p 149

⁷³ Tr 9/14/2016, p 149

⁷⁴ Tr 9/14/2016, p 154

⁷⁵ Tr 9/14/2016, p 155-156

⁷⁶ Tr 9/14/2016, p 156-157

⁷⁷ Tr 9/14/2016, p 160

⁷⁸ Tr 9/14/2016, p 161-163, 169

⁷⁹ Tr 9/14/2016, p 169-170

health reasons; however, his testimony given during the preliminary examination in this matter was read into the record pursuant to MRE 804(a)(4) and (b)(1).⁸⁰ Sgt. Jaskulka, who was qualified as an expert in the field of Fire Investigation, recalled being dispatched to the Saginaw Home Depot on October 29, 2015 to investigate a structure fire.⁸¹ Sgt. Jaskulka determined that the fire's point of origin was a vertical stack of insulation located in aisle 13, bay 20.⁸² He further indicated that the cause of the fire was "incendiary as a result of arson, which means that a competent open flame ignition source was introduced to a combustible material that allowed it to propagate vertically and attack the adjacent row/aisle of Bay 16 as well."⁸³ Sgt. Jaskulka also surveyed the scene for electrical and mechanical devices that were in close proximity to the area of origin and was unable to locate any type of ignition sources that would have ignited the combustible materials in bay 20.⁸⁴

Gina Swann testified that she was dating and lived with Jenkins in October of 2015.⁸⁵ She also confirmed that Jenkins went by the nickname "Stone."⁸⁶ Lastly, she testified that, back in October of 2015, she owned a "goldish cream colored" Ford Escape, with the license plate number DGQ1720, that Jenkins was allowed to drive.⁸⁷ In addition, Furline's fiancée Maria Harper testified that, in October of 2015, she drove a 2000 maroon Chevy Blazer that Furline was allowed to drive.⁸⁸

Three special agents with the U.S. Department of Justice Bureau of Alcohol, Tobacco, and Firearms ("ATF") Flint office also testified at trial regarding cell phone records. Special

⁸⁰ Tr 9/14/2016, p 176

⁸¹ PE 1/12/2016, p 65

⁸² PE 1/12/2016, p 66

⁸³ PE 1/12/2016, p 69

⁸⁴ PE, 1/12/2016, p 69

⁸⁵ Tr 9/14/2016, p 178-179

⁸⁶ Tr 9/14/2016, p 183

⁸⁷ Tr 9/14/2016, p 178

⁸⁸ Tr 9/16/2016, p 91-92

Agent Harry Powers testified that, in addition to his duties as a criminal investigator, he also does forensic downloads of cellular phones and other types of digital devices.⁸⁹ On November 4, 2015, Agent Powers was contacted by some state agents regarding a fire that had taken place at Home Depot stores, and he assisted the Saginaw County Sheriff's Department with execution of search warrants.⁹⁰

Special Agent Candace Booth had been present during Jenkins' police interview, and during the course of that interview, she obtained permission to download the data from Jenkins' cellular phone.⁹¹ Agent Booth then provided the phone to Agent Powers in order for him to download the data.⁹² Once the data had been downloaded onto a separate source, both the phone and the data were returned to Agent Booth.⁹³

Agent Booth then provided the data to ATF Intelligence Research Analyst, Susan Roman for analysis.⁹⁴ Agent Roman prepared a report, which included a list of phone calls to/from the phone on October 28, 2015 between 1:00 and 2:00 p.m. as well as the location of the phone at the time the calls were made/received.⁹⁵ Agent Royal testified that the report showed that, on October 28, 2015, Jenkins' cell phone "pinged" near two Home Depots at 1:00 p.m. and 2:00 p.m. – the first one being near the Flint Home Depot at 12:58 p.m., and the second being near the Burton Home Depot at 1:54 p.m.⁹⁶

Kyle Penoyer, who was employed back in October of 2015 as a District Asset Protection Manager in the Flint and Saginaw are, was responsible for theft, fraud and environmental safety

⁸⁹ Tr 9/15/2016, p 6

⁹⁰ Tr 9/15/2016, p 6

⁹¹ Tr 9/15/2016, p 12

⁹² Tr 9/15/2016, p 8

⁹³ Tr 9/15/2016, p 8

⁹⁴ Tr 9/15/2016, p 17-18

⁹⁵ Tr 9/15/2016, p 19

⁹⁶ Tr 9/15/2016, p 28-29

for approximately ten Home Depot stores within the district, including Flint and Saginaw.⁹⁷ As part of his duties, Penoyer conducted an investigation regarding the amount of damage done to the Flint and Saginaw stores. Penoyer also testified that both the Flint and Saginaw stores had approximately 30 surveillance cameras set up around the store because they were considered to be “low-risk, level two stores”.⁹⁸

Jamie Mansfield, the Corporate Investigator for Home Depot, was in charge of supervising the lower-level security personnel, and when incidents occurred, it was her role to assist them with identifying suspects and eventually, to help build a criminal investigation against the people who committed the crimes.⁹⁹ During the trial, Ms. Mansfield provided testimony regarding the surveillance videos collected in this case for the Flint, Burton and Saginaw Home Depot stores. In regards to the incident at the Flint Home Depot, Mansfield testified that the suspect’s vehicle was determined to have been a 2008 Ford Escape that was light tan in color.¹⁰⁰ She further testified that the fire at the Flint store was started between 1:28 and 1:30 p.m. on October 28, 2015, and at approximately 1:52 p.m., the suspect vehicle can be seen pulling into the Home Depot store located in Burton.¹⁰¹ At 1:54 p.m., a no-receipt return was processed for a Dewalt table saw in the amount of \$401.74, paid to him in the form of store credit, and the person who returned the saw was identified as Furline.¹⁰²

The Saginaw store surveillance footage was also shown to the jury during Mansfield’s testimony.¹⁰³ At approximately 11:50 a.m. on October 29, 2015, a maroon-colored SUV can be seen pulling up to the store, and two subjects exited the vehicle – one wearing a red hoodie and

⁹⁷ Tr 9/15/2016, p 35

⁹⁸ Tr 9/15/2016, p 39

⁹⁹ Tr 9/15/2016, p 47

¹⁰⁰ Tr 9/15/2016, p 54

¹⁰¹ Tr 9/15/2016, p 61

¹⁰² Tr 9/15/2016, p 65

¹⁰³ Tr 9/15/2016, p 68

cap, and one dressed in all dark clothing.¹⁰⁴ Between 12:14 p.m. and 12:22 p.m., the subject in the red hoodie, dark pants and dark hat (later identified as Defendant-Appellee) can be seen standing at the service desk.¹⁰⁵ At 12:31 p.m., the fire is noticed by staff members, and an associate can be seen grabbing the cart that Furline had and pushing it out of the way.¹⁰⁶ After that, the person in all dark colored clothing (Jenkins) can be seen exiting the store, and the person in the red hooded sweatshirt and dark pants (Furline) exited behind him.¹⁰⁷

The fire at the Flint Home Depot was also determined to have resulted from arson. Sergeant Dan Kelly of the Charter Township of Flint Fire Department, was qualified at trial as an expert in the field of arson and fire investigation, testified that he concluded the fire had been intentionally set because there was no contrary evidence to show the fire was caused by anything electrical or any other source.¹⁰⁸

Doris Furline-Walker, Defendant-Appellee's mother, also testified at trial.¹⁰⁹ While she was not present during the incident at the Saginaw Home Depot, she did participate in the incident that had taken place at the Flint Home Depot on October 28, 2015.¹¹⁰ When shown a portion of the surveillance footage from that day, Ms. Furline-Walker was able to identify herself, Furline, and Jenkins (who she knew as "Alvin Stone") in the store beginning around 1:30 p.m.¹¹¹ She further identified a flaming shopping cart on the surveillance footage with her son in close proximity, and she testified that, at that point, she proceeded to exit the store with a stolen power saw.¹¹² She took the power saw out to the car she arrived in with Furline and Jenkins,

¹⁰⁴ Tr 9/15/2016, p 69

¹⁰⁵ Tr 9/15/2016, p 72

¹⁰⁶ Tr 9/15/2016, p 75-76

¹⁰⁷ Tr 9/15/2016, p 75-76

¹⁰⁸ Tr 9/16/2016, p 10, 14, 15-16

¹⁰⁹ Tr 9/16/2016, p 52

¹¹⁰ Tr 9/16/2016, p 54

¹¹¹ Tr 9/16/2016, p 54-56

¹¹² Tr 9/16/2016, p 57

which was a beige SUV that she believed belonged to Jenkins.¹¹³

Furline-Walker testified that she later took the power saw to another Home Depot and returned the item in exchange for a gift card with store credit, which she later sold to a party store and split the proceeds with Jenkins.¹¹⁴ Ms. Furline-Walker also testified that, later on that day, Jenkins called her and told her that “he didn’t mean to set that fire like that ... at the Home Depot.”¹¹⁵ According to Ms. Furline-Walker the next day, Jenkins asked her if she wanted to go to the Saginaw Home Depot to “hit a lick” (i.e., steal), but she declined.¹¹⁶ While she testified that she did not know if Furline accompanied Jenkins to the Saginaw Home Depot, Ms. Furline-Walker distinctly recalled that it was Jenkins’ idea to “hit a lick” at the Saginaw store.¹¹⁷

Detective Larry Biniecki was also called to the scene of the fire at the Saginaw Home Depot on October 29, 2015.¹¹⁸ Detective Biniekcki then began his investigation, which included viewing surveillance footage, having a conversation and viewing photographs from Kyle Penoyer and Jeremy Greenleaf and making contact with two loss prevention managers from Lowe’s – Justin Luczak and Joy Royal.¹¹⁹ After conducting this preliminary investigation, Detective Biniecki was able to develop two suspects – Terrance Furline and Alvin Jenkins.¹²⁰ From there, Detective Biniecki executed search warrants at both Defendants’ residences, where he located the clothing that can be seen on the surveillance videos as well as the vehicles that were involved in both the Flint and Saginaw incidents.¹²¹

Furline was subsequently charged, along with Jenkins, with (1) Conducting a Criminal

¹¹³ Tr 9/16/2016, p 58-59

¹¹⁴ Tr 9/16/2016, p 61; Ms. Furline-Walker initially denied that she was able to return the item; however, she eventually admitted that she was able to do a no-receipt return in exchange for a gift card. Tr 9/16/2016, p 59

¹¹⁵ Tr 9/16/2016, p 63

¹¹⁶ Tr 9/16/2016, p 62-63

¹¹⁷ Tr 9/16/2016, p 63, 85

¹¹⁸ Tr 9/16/2016, p 128

¹¹⁹ Tr 9/16/2016, p 140-141, 143

¹²⁰ Tr 9/16/2016, p 148

¹²¹ Tr 9/16/2016, p 149-153

Enterprise¹²², (2) Third-Degree Arson¹²³, (3) Conspiracy to Commit Third-Degree Arson¹²⁴, (4) First-Degree Retail Fraud¹²⁵, and (5) Conspiracy to Commit First-Degree Retail Fraud¹²⁶ as a Habitual Offender, Fourth Offense.¹²⁷ The retail fraud and arson charges were charged under an aiding and abetting theory.¹²⁸

On April 14, 2016, Furline filed a motion for separate trials. A hearing was held on Defendant-Appellee Furline's Motion on May 5, 2016, and Jenkins joined in Furline's motion. The basis for Furline's motion in this regard was an interview that took place between Jenkins and law enforcement on November 6, 2015, wherein Jenkins denied setting the fire at Home Depot, and instead, claimed Furline admitted that he had started the fire. The Motion did not claim that Jenkins blamed the retail fraud solely on Furline, nor did Furline's affidavit contain a statement that Jenkins blamed him for the retail fraud. The sole point of contention at the time of the motion hearing was which of the two defendants set the fire. On June 2, 2016, the trial court issued an opinion and order denying Defendants' motion based on its conclusion that Defendants' motion merely demonstrated antagonistic claims as to who was responsible for setting the fire as opposed to mutually exclusive or irreconcilable defenses.

Both Defendants were tried together in a single trial before a single jury. At the conclusion of the trial, the jury convicted Furline and Jenkins on all charges.¹²⁹ On November 3, 2016, both Jenkins and Furline were sentenced to the Michigan Department of Corrections for a term of 360-600 months.¹³⁰ Jenkins and Furline were also ordered to pay restitution in the

¹²² MCL 750.159i(1)

¹²³ MCL 750.74

¹²⁴ MCL 750.74

¹²⁵ MCL 750.356c

¹²⁶ MCL 750.356c

¹²⁷ MCL 750.12

¹²⁸ *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006)

¹²⁹ Tr 9/16/2016, p 68-73

¹³⁰ Sentencing, 11/3/2016, p 10

amount of \$777,982.90, jointly and severally with each other.¹³¹ Furline is currently incarcerated at the Saginaw Correctional Facility, located in Freeland, Michigan. His earliest parole eligibility date is July 2, 2043; his maximum discharge date is July 1, 2065. Furline filed an appeal of right with the Michigan Court of Appeals on November 30, 2016. Jenkins is currently incarcerated at the St. Louis Correctional Facility, located in St. Louis, Michigan. His earliest parole eligibility date is July 5, 2042; his maximum discharge date is November 5, 2065. Jenkins filed an appeal of right with the Michigan Court of Appeals on December 19, 2016.

¹³¹ Sentencing, 11/3/2016, p 10

ARGUMENT I

THE COURT OF APPEALS CLEARLY ERRED, CAUSING MATERIAL INJUSTICE, WHEN IT VACATED DEFENDANTS-APPELLEES' CONVICTIONS AND SENTENCES AND REMANDED FOR A NEW TRIAL BASED ON ITS DETERMINATION THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLEE FURLINE'S MOTION FOR SEPARATE TRIALS

A. STANDARD OF REVIEW

The decision as to whether codefendants will be tried separately or jointly rests within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of that discretion.¹³² “An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes.”¹³³

B. LEGAL STANDARDS

“There is no absolute right to separate trials, and in fact, [a] strong policy favors joint trials in the interest of justice, judicial economy, and administration.”¹³⁴ Pursuant to MCL 768.5 and MCR 6.121(D), the decision to sever or join defendants for trial is within the discretion of the trial court.¹³⁵ A defendant's right of severance is governed by MCR 6.121(C). Under that rule, “[s]everance is mandated ... only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.”¹³⁶ If a defendant fails to make this showing in the trial court, reversal of a

¹³² *People v Hicks*, 185 Mich App 107, 117; 460 NW2d 569 (1990)

¹³³ *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009)

¹³⁴ *People v Bosca*, 310 Mich App 1, 44; 871 NW2d 307 (2015) (quotation marks and citation omitted; alteration in original)

¹³⁵ *People v Hana*, 447 Mich 325, 346; 524 NW2d 682, amended on reh in part sub nom *People v Gallina*, 447 Mich 1203; 524 NW2d 710 (1994), and amended on reh in part sub nom *People v Rode*, 447 Mich 1203; 524 NW2d 710 (1994)

¹³⁶ *Id.*

court's decision to join defendants for trial is precluded "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial."¹³⁷

Defendants are not entitled to severance merely because they "may have a better chance of acquittal in separate trials," because the defendants "may attempt to escape conviction by pointing the finger at each other," or simply because another defendant may testify at trial.¹³⁸ Rather, to warrant severance, the defenses presented must be "mutually exclusive" or "irreconcilable," meaning that the "jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant."¹³⁹ "[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice."¹⁴⁰ In sum, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."¹⁴¹

C. DISCUSSION

In the present case, the Court of Appeals concluded that, since each Defendant denied involvement in all incidents that occurred at the Saginaw store and completely blamed the other for what transpired, and because the People's theory was one of aiding and abetting, and both Defendants attempted to introduce evidence blaming the other, the jury question turned from not whether the individual codefendants acted in concert to commit the crimes alleged, but which of the two was guilty. Alternatively, the Court of Appeals opined that, at the very least, Furline and Jenkins should have been granted separate juries to evaluate the evidence against each Defendant. The People respectfully disagree with the Court of Appeals' conclusions in this

¹³⁷ *Id.* at 346–347

¹³⁸ *Id.* at 349–350 (citations omitted)

¹³⁹ *Id.* at 349–350 (citations omitted)

¹⁴⁰ *Id.* (quotation marks and citation omitted)

¹⁴¹ *Id.* at 359–360

regard.

1) The Court of Appeals' decision is inconsistent with the principles set forth by this Honorable Court in *People v Hana*.

While the Court of Appeals' decision in the instant case is based largely upon this Court's decision in *Hana, supra*, the Court of Appeals' holding is inconsistent with principles set forth in *Hana*. In *Hana*, both defendants were charged with possession of cocaine – 650g or more and delivery of 225-650g of cocaine.¹⁴² Prior to trial, both defendants moved for separate trials based on one defendant's claim that the drugs belonged to the other defendant.¹⁴³ The trial court denied the motions.¹⁴⁴ At trial, neither defendant testified; however, after the prosecution rested, the defense renewed the motion to sever.¹⁴⁵ In his renewed motion, one of the defendants argued that it was not dispositive that neither he nor his co-defendant actually testified against one another because the evidence pitted them against one another; in order for one to be acquitted, the jury had to find that the narcotics belonged exclusively to the other.¹⁴⁶ This Court, however, disagreed with the defendant's contention.¹⁴⁷

Specifically, this Court found that the affidavit submitted by defendant in support of his motion for severance, which was similar to the affidavit filed in the instant case, was conclusory in nature. This Court also found that the affidavit lacked sufficient specificity to enable the trial court to accurately determine what the defenses would be, how the defenses would affect each other, and whether the defendants' respective positions were indeed mutually exclusive or merely inconsistent.

¹⁴² *Id.* at 332

¹⁴³ *Id.* at 352

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 353

¹⁴⁶ *Id.* at 354

¹⁴⁷ *Id.*

In finding that the trial court properly denied the defendant's motion for severance, this Court also noted that potentially prejudicial evidence, either physical or testimonial, was not substantiated by the affidavit or at the hearing. Similarly, in the present case, Furline claimed that the potentially prejudicial evidence was a recorded interview between Jenkins and law enforcement wherein Jenkins blamed Furline for starting the fire at the Saginaw Home Depot. However, Furline did not specify which interview he was referring to, nor did he indicate that there had been several interviews in which Jenkins continued to change his story regarding his own involvement in the charged offenses.

In concluding that the defendant failed to substantiate the potentially prejudicial evidence in the affidavit or during the hearing, this Court determined that a trial court ruling on a pretrial motion must have concrete facts on which to base a ruling and that mere finger pointing did not suffice.¹⁴⁸ This Court also declined to interfere with the trial court's discretion in the absence of proof that clearly, affirmatively, and fully demonstrated that the defendant's substantial rights were prejudiced and that severance was necessary.

Finally this Court noted that, "[w]ith the benefit of hindsight, we further find that defendant was not irretrievably prejudiced at trial. Neither defendant testified, so there were no express cross-accusations. Indeed, apart from the noted comments of respective counsel in their opening statements and summations, there was nothing inherently antagonistic in the evidence adduced at trial." This Court also stated that "[t]he most obvious points of conflict were the statements made by defendant and his brother to the police that were admitted at trial. Defendant's statement, written into the officer's report, was as follows:

Mr. Hana, after being advised of his rights, when asked about the safe that was found in his bedroom, stated that the safe belonged to him and that he knew the combination of it. He stated he kept his mother's jewelry, some personal papers

¹⁴⁸ *Id.* at 355

and blank checks in the safe. He denied knowing there were three kilos of suspected cocaine in the safe. He said he shares the bedroom with his brother but he had no idea what his brother was doing.¹⁴⁹

Unlike the scenario in *Hana*, during the joint trial in the instant case, none of the police witnesses testified about statements made by either Furline or Jenkins, except that Furline wanted the police to contact his mother.¹⁵⁰ As a result, the Court of Appeals' ruling is based solely on Furline's reference to an unidentified interview with Jenkins that was revealed during discovery wherein Jenkins told law enforcement that Furline was responsible for setting the fire, Furline's counterclaim that he intended to blame Jenkins for starting the fire, isolated comments made by defense counsel during their opening statements and closing arguments, and the testimony of Doris Furline-Walker, which will be addressed in further detail below. The People maintain that the Court of Appeals erred in this regard and that its ruling runs afoul to the principles set forth by this Court in *Hana, supra*.

2) At the time of the hearing on Defendant-Appellees' Motion for Separate Trials, they failed to establish that their substantial rights would be prejudiced and that severance was the necessary means of rectifying the potential prejudice.

In the instant case, the Court of Appeals found that the trial court abused its discretion in denying Furline's motion for separate trials. Specifically, based on an interview between Jenkins and members of law enforcement wherein Jenkins allegedly blamed both the theft and the arson on Furline, and based on Furline's expressed intention to blame both the theft and the arson on Jenkins, the defenses were mutually exclusive and antagonistic.

First, the Court of Appeals' recitation of the Furline's position conflicts with the record in this matter. Specifically, with regard to the motion for separate trials, Furline claimed only that Jenkins pointed the finger at him for starting the fire; nowhere in the motion, hearing transcript,

¹⁴⁹ *Id.* at 355-356

¹⁵⁰ Tr 9/16/2016, p 123

or affidavit does Furline disavow his participation in the theft.¹⁵¹ Likewise, during the recorded interview that Furline referenced in his motion, the detectives only wanted to know who started the fire, and Jenkins appears to admit his participation in the retail fraud.¹⁵² Second, at the time the trial court decided the motion for separate trials, Furline's accompanying affidavit merely stated that Jenkins gave a taped statement in which he indicated that Furline started the fire at the Saginaw Home Depot. The affidavit also claimed that Jenkins told investigators that Furline admitted setting the fire.

Significantly, the People never alleged that both Jenkins and Furline set the fire together; the setting of the fire was only a method of diversion in order to complete the retail fraud. In fact, it was the People's theory at trial that Furline set the fire at the Saginaw Home Depot on October 29, 2015 and that Jenkins' role in the criminal enterprise was to remove the merchandise from the store while everyone was evacuating. There was no indication on the record that Jenkins intended to testify against Furline, other than a statement made in an interview approximately six months before the hearing on Furline's motion, that detectives later determined to be of little value. As a result, the People would not have been able to introduce Jenkins' recorded interview at trial unless he ultimately decided to testify.¹⁵³ Therefore, the trial court correctly determined that, at best, Defendant-Appellees merely demonstrated antagonistic claims as to who was responsible for setting the fire as opposed to mutually exclusive or irreconcilable defenses.

¹⁵¹ See attached People's Exhibits 2 (Motion for Separate Trials), 3 (Hearing Transcript), 4 (Affidavit), 5 (interviews with Jenkins), and 6 (Opinion and Order dated June 2, 2016)

¹⁵² See 11/6/15 interview @ 15:04.

¹⁵³ Given that Jenkins had entered a plea to Identity Theft on April 28, 2016 (just prior to the hearing on Furline's motion), and because both the police and the prosecution indicated that Jenkins would not be offered leniency in exchange for testimony or statements against Furline (see 12/4/15 recorded interview), it was not likely that Jenkins was going to opt to take the stand and testify against Furline at trial. However, even if he had testified, the jury was still free to find Furline guilty under an aiding and abetting theory.

3) There is no significant indication that the requisite prejudice occurred at trial.

In finding that the trial court abused its discretion in declining to grant separate trials, the Court of Appeals also concluded that, while the recorded interview involving Jenkins was not played, and despite the fact that neither Defendant testified at trial, Doris Furline-Walker and Joy Royals' testimony created a subtle effect of joining two defendants who asserted mutually exclusive defenses.

During Furline-Walker's testimony, she specifically identified her son, Terrance Furline, in still photos of surveillance footage from the date of the Flint Home Depot incident. She also identified Jenkins in other photographs that were part of the same exhibit. Ms. Furline-Walker further indicated that she completed a no-receipt return for the power tool taken from the Flint Home Depot, split the money with Jenkins, and gave part of her share to Furline. In addition, while Ms. Furline-Walker did testify that Jenkins told her he was going to "hit a lick" at the Saginaw Home Depot and that he mentioned something about setting the fire, she also noted that she was not present for the Saginaw Home Depot incident, and she did not know if Furline had accompanied Jenkins to the Saginaw Home Depot on October 29, 2015. Since Ms. Furline-Walker was not present for the Saginaw incident, she could not have offered testimony that Furline did not participate in the arson or the theft.¹⁵⁴ Also, her testimony that Furline was not involved in the Flint incident was belied by the presence of Furline's signature on the receipt for a return he completed at the Lowe's store in Burton and by the testimony of Joy Royal confirming the same.

The Court of Appeals interpreted Ms. Furline-Walker's testimony as "promot[ing] [Furline's] defense that it was Jenkins' idea to commit arsons and thefts at home improvement

¹⁵⁴ See MRE 602

stores and he had nothing to do with Jenkins' plan."¹⁵⁵ The Court of Appeals also found that, while Jenkins did not have a similar witness in his corner at trial, the cross-examination of Furline-Walker and Joy Royal's testimony that Furline signed for a no receipt return at the Burton Lowes, essentially created a situation that "had the subtle effect of joining defendants who have asserted mutually exclusive defenses."¹⁵⁶ In other words, the Court of Appeals concluded that, based on Jenkins' prior statement and the aforementioned testimony, Jenkins and Furline established mutually exclusive defenses, which created a situation at trial where, in order to believe the core of the evidence offered on behalf of one defendant, the jury would have had to disbelieve the core of the evidence offered on behalf of the co-defendant.

The People maintain that the Court of Appeals erred in finding that the aforementioned testimony created the requisite prejudice at trial. Ms. Furline-Walker's testimony, in large part, was suspect at best, and more importantly, nothing in her testimony could have served to acquit Furline and convict Jenkins. Likewise, Joy Royal's testimony regarding Furline's signature for the no receipt return did not amount to a mutually exclusive defense on behalf of Jenkins. As the Ninth Circuit noted in *United States v Tootick*, the case cited by the Court of Appeals, "[m]utually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other."¹⁵⁷ "The prototypical example is a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime."¹⁵⁸ The circumstances presented in the instant case do not present the same situation.

First, as noted above, the recorded interview between Jenkins and detectives on November 6, 2015 consisted of Jenkins blaming Furline for setting the fire, but admitting to participating in the retail fraud, in an effort to negotiate a lesser charge. This does not amount to

¹⁵⁵ *Furline, supra* at 6; *Jenkins, supra* at 6

¹⁵⁶ *Id.*

¹⁵⁷ *United States v Tootick*, 952 F2d 1078, 1081 (CA 9, 1991)

¹⁵⁸ *Id.* (citation omitted)

an attempt to prove that Furline committed the arsons and retail frauds on his own.

Second, Doris Furline-Walker's testimony with regard to Furline's lack of involvement in the Flint incident conflicted significantly with other testimony that she provided, such as (1) Furline's presence at the Flint Home Depot, (2) his location in the store moments before the fire, (3) the fact that he left the store with Furline-Walker and Jenkins after the fire had been set and the merchandise had been stolen, (4) the fact that Furline shared in the proceeds of the retail fraud and fraudulent return, and (5) the fact that he signed for a no receipt return at the Burton Lowes shortly after leaving the Flint Home Depot. Thus, it cannot be said that Furline-Walker's testimony created a mutually exclusive defense.

Without actually pointing a finger at the other, Furline and Jenkins each essentially argued that he was not the one who started the fire. While these defenses may have created some incidental spillover prejudice, one may not overlook the fact that both Furline and Jenkins were tried for first-degree retail fraud and third-degree arson under an aiding and abetting theory or as a principal. Although they incidentally implicated one another as the one who set the fire, their defenses were not mutually exclusive or irreconcilable, and there is no distinction between a principal and an aider and abettor for purposes of criminal liability.¹⁵⁹

Moreover, to the extent Furline's denial of responsibility for setting the fire was arguably at odds with Jenkins' effort to attribute the arson to Jenkins, as this Court noted in *Hana, supra*, finger pointing such as this by co-defendants does not create mutually exclusive antagonistic defenses where, as in this case, the jury was instructed on an aiding and abetting theory.¹⁶⁰ In such circumstances, no prejudice is created by finger pointing because "[t]he properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency

¹⁵⁹ MCL 767.39; *People v Mass*, 464 Mich. 615, 627; 628 NW2d 540 (2001)

¹⁶⁰ *Hana, supra*, at 360–361

because one found guilty of aiding and abetting can also be held liable as a principal.”¹⁶¹ In other words, Jenkins and Furline failed to show the existence of prejudice because Furline would have been properly found guilty whether the jury believed he merely aided Jenkins or whether they believed he personally started the fire, and vice versa. In short, Defendant-Appellees failed to show the existence of mutually exclusive antagonistic defenses, and the Court of Appeals erred in granting relief on this basis.

4) Holding separate trials in two cases that have identical witnesses and evidence would have been unnecessarily duplicative and excessive

The Court of Appeals also notes in its opinion that, perhaps, dual juries would have negated or significantly lessened the chance of prejudice under the circumstances of this case; however, the People disagree. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration clearly favored a joint trial before a single jury.

The risk of prejudice in holding a joint trial may not only be allayed by proper instructions, but by the use of dual juries as well. This procedure has been successfully used in Michigan.¹⁶² The use of separate juries is a partial form of severance to be evaluated under the standard, set forth above, applicable to motions for separate trials.¹⁶³ The dual-jury procedure should be scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant.¹⁶⁴ The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed.¹⁶⁵

As noted above, contrary to the Court of Appeals’ and Defendant-Appellees’ conclusion in this regard, this was not a case where one defendant was pitted against the other through

¹⁶¹ *Id.*

¹⁶² *Id.* at 351-352 (citations omitted)

¹⁶³ *Id.* (citations omitted)

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

mutually exclusive or irreconcilable defenses. Specifically, in Furline's brief on appeal, he claimed that the trial court erred in denying severance based on a small portion of the closing argument by Jenkins' counsel where Furline pointed the finger at Jenkins, thus rendering their defenses "antagonistic and irreconcilable." There is no "significant indication" that the requisite prejudice occurred at trial in this case; thus, this contention is wholly without merit.¹⁶⁶

While Furline claimed that Jenkins' counsel "pointed the finger at" him and "disavowed any association with the thefts or fires"¹⁶⁷, he failed to provide any quoted language from the trial transcripts that would have tended to support his position. Instead, Furline set forth a blanket citation to four pages of the closing argument by Jenkins' counsel where he references Furline's presence on the video surveillance footage. In particular, Jenkins' counsel noted that: (1) Furline was the person shown on the surveillance footage having a Flint Home Depot employee load a table saw onto his cart¹⁶⁸, (2) Furline was shown on the Flint Home Depot surveillance footage standing a couple of feet away from Ms. Furline-Walker, who ultimately removed the table saw from the store¹⁶⁹, (3) Jenkins sat at the front of the Saginaw Home Depot next to the cashier because he "[did not] want any part in this"¹⁷⁰, (4) Jenkins went to aisle 13 briefly and then exited the store when people started to evacuate¹⁷¹, and (5) Furline was the person shown on the surveillance footage executing a no-receipt return of the table saw that was stolen from the Flint Home Depot.¹⁷²

Contrary to Furline's assertion in his brief on appeal, the challenged portion of Jenkins' counsel's closing argument appeared to be an attempt to "disavow" any participation in the

¹⁶⁶ *Id.* at 346-47

¹⁶⁷ Furline's Brief on Appeal, p 24

¹⁶⁸ Tr 9/20/2016, p 33

¹⁶⁹ Tr 9/20/2016, p 34 (this is also consistent with Ms. Furline-Walker's testimony regarding Furline's position in the store).

¹⁷⁰ Tr 9/20/2016, p 34

¹⁷¹ Tr 9/20/2016, p 35

¹⁷² Tr 9/20/2016, p 35-36

incident or association with Furline in an effort to rebut the Racketeering and Conspiracy charge(s) as opposed to an attempt to place all blame on Furline for the charged crimes. In fact, Jenkins' counsel specifically argued that neither Defendant was responsible for starting the fires, and when they exited the store, both Furline and Jenkins were empty handed.¹⁷³ Furline's trial counsel argued that the jury would be left with reasonable doubt as to whether Jenkins and Furline committed the charged offenses. Since both defenses were based on the same premise (*i.e.*, that there was no criminal enterprise and reasonable doubt as to whether Jenkins committed the remaining offenses), they were not mutually exclusive or irreconcilable, and therefore, the use of separate juries was not warranted.

Moreover, even if Jenkins' counsel had attempted to point the finger at Furline during his closing argument, Furline needed to demonstrate that his defense was so antagonistic to Jenkins that the defenses were mutually exclusive. In other words, Furline needed to show that, in order to believe the core of the evidence offered on his behalf, the jury needed to disbelieve the core of the evidence offered on behalf of Jenkins.¹⁷⁴ Notwithstanding Furline's assertions to the contrary, the jury did not have to disbelieve Jenkins in order to believe Furline.

Likewise, as noted above, to the extent that Furline-Walker's testimony is claimed to have fulfilled the "requisite prejudice" requirement, it cannot be said that her attempt to minimize Furline's involvement in the Flint incident somehow pitted Furline and Jenkins against one another. Ms. Furline-Walker's testimony does not present the same situation as one co-defendant testifying against the other. While she may have testified that it was Jenkins' idea to set the fires, this fact did not exonerate Furline because the jury could have still convicted him under an aiding and abetting theory regardless of whether he started the fires.

¹⁷³ Tr 9/20/2016, p 38

¹⁷⁴ *Hana, supra* at 349-50 quoting *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801 (1984)

Likewise, Ms. Furline-Walker was not present for the Saginaw Home Depot incident, and thus, she could not provide any information in regards to Furline's involvement. Since the Flint incident was not charged against either Defendant, and because it was simply an element of demonstrating that Jenkins and Furline were engaged in a criminal enterprise, the effect of Ms. Furline-Walker's testimony, if any, would have been to negate an inference that Furline was engaged in a criminal enterprise – which would have effectively exonerated Jenkins from that charge as well. In fact, under the circumstances presented in this case, it would appear that Furline-Walker's testimony would have posed a greater risk of prejudice, at least to Jenkins, if separate juries were permitted to consider Furline and Jenkins individually. Therefore, at most, the use of separate juries, may have given Furline a better chance of acquittal; however, this Court has held that basis to be insufficient to mandate separate trials or separate juries.¹⁷⁵

Finally, the trial court's reading of M Crim JI 3.7 (Multiple Defendants) cured any risk of prejudice in having a single jury decide the guilt or innocence of both Defendants.¹⁷⁶ "Juries are presumed to follow their instructions."¹⁷⁷ Moreover, even if this Court finds that the use of separate juries would have been a reasonable choice under the circumstances, that fact, in and of itself, does not mandate a finding that the use of a single jury for both Defendants fell outside the range of principled outcomes.¹⁷⁸ Based on the foregoing, the People maintain that a joint trial, before a single jury, was proper in this matter.

¹⁷⁵ *Id.* at 350

¹⁷⁶ Tr 9/20/2016, 47

¹⁷⁷ *Hana, supra* at 351

¹⁷⁸ *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006)

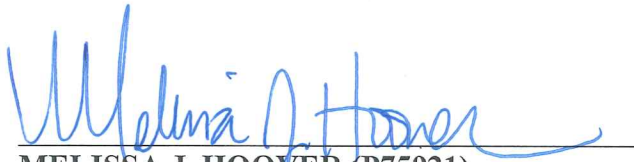
SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People respectfully request that this Honorable Court grant their application for leave to appeal the judgment of the Court of Appeals or, in the alternative, in lieu of granting leave to appeal, reverse the judgment of the Court of Appeals and remand this case for reinstatement of Defendant-Appellees' convictions and sentences.

Respectfully submitted,

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Dated: August 21, 2018



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